IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance (Thailand) Company, Ltd., Tokio Marine & Nichido Fire Insurance Co., Ltd., *et al*, Plaintiffs/Appellees, vs. Eleni Maritime Limited *in personam* and Empire Bulkers Limited, Defendants/Appellants.	Supreme Court Case No. 2018-005 ORDER DISMISSING INTERLOCUTORY APPEAL

Before: Cadra, C.J., Single Judge Procedural Order:

Defendants/Appellants, Eleni Maritime Limited and Empire Bulkers Limited, appeal a May 11, 2018, Partial Summary Judgement Order by the High Court. Plaintiffs/Appellees, Chubb Insurance (Thailand), Tokio Marine & Nichido Fire Insurance Co, Ltd, et al, have moved to dismiss the appeal.

For the reasons set forth below, the undersigned, dismisses the instant appeal without prejudice to an appeal upon the entry of a final judgment.

I. FACTUAL BACKGROUND & PROCEEDINGS BELOW

The basic facts underlying this case have been previously summarized in the Supreme Court's June 3, 2017, "Opinion on Removed Question," and are not reiterated here. The following procedural background is gleaned from the parties' filings relative to defendant's present appeal.

On May 11, 2018, the High Court issued an "Order Granting Plaintiff's Motion for Partial Summary Judgment" ("PSJ Order"). The High Court found that the Eleni defendants were 70% at fault in causing the collision and, therefore, concluded that under the United States general maritime law "innocent cargo rule" the Eleni defendants are liable to claimants for the full amount of all provable damages. The High Court set a scheduling conference for May 22, 2018 "to establish dates for further

litigation in this matter (up to and including a trial on the merits as may be necessary)." At the May 22, 2018, scheduling conference and in a subsequent written order, the High Court stated that it had not directed the entry of a "final appealable judgment."

On June 11, 2018, the Eleni defendants filed a Notice of Appeal of the High Court's May 11, 2018, PSJ Order.

On June 21, 2018, plaintiffs filed a "Motion to Strike and/or Dismiss Defendant's June 11, 2018 Notice of Appeal." Plaintiffs argue that the Eleni defendants improperly attempt to appeal a non-final interlocutory order which the High Court expressly characterized as non-appealable and which was not certified as appealable under MIRCP 54(b). Plaintiffs further requested an award of attorney fees for a "frivolous appeal."

The Eleni defendants filed a SCRP Rule 3(c)(3) Supplement on June 21, 2018, arguing the May 11, PSJ Order was final as "it establishes the rights and liabilities of the parties even though the precise amount of damages is not yet settled." Because the method of calculating damages has been established by the Supreme Court's prior decision and because the damages calculation is fairly simple, there is no practical benefit that would accrue by delaying appeal until the damages issue is determined.

On June 26, 2018, defendants filed an opposition to plaintiff-appellee's motion to strike and/or dismiss the Notice of Appeal. Defendants incorporated their Rule 3(c)(3) supplement regarding the "finality" of the PSJ Order. In the alternative, defendants argue that the general maritime law (GML) of the United States, which is made applicable to the Republic by virtue of 47 MIRC Sec. 113, permits an interlocutory appeal of liability decisions. Defendants point out that it would be a waste of the High Court's time to determine damages on hundreds of cargo claims and then entertain an appeal on liability, which results in the damages order being overturned.

II. DISCUSSION

A. Absent Statute or Rule, The RMI Supreme Court Only Has Jurisdiction to Hear Appeals From "Final Decisions."

Supreme Court Rules of Procedure (SCRP), Rule 4(a)(1) allows an appeal where "permitted by law as of right or at the discretion of the Supreme Court from any 'final decision' of any court or by an order of a court granting an interlocutory appeal permitted by statute or rule." Thus, the first inquiry is whether the High Court's May 11, 2018, PSJ Order is a "final decision" from which an appeal is authorized.

1. The May 11, 2018, PSJ Order Is Not a "Final Decision" Because It Does Not Dispose Of All Claims "Leaving Nothing For The Trial Court To Do."

The RMI Supreme Court has consistently held that "a final judgment or order is one that disposes of the case, whether before or after trial." *Lemari, et al, v. Bank of Guam*, 1 MILR (Rev.) 299, 301 (1992) *citing prior decisions*.

The RMI's approach to "finality" is consistent with that of the United States federal courts and those state courts whose rules are modeled after the federal rules of appellate and civil procedure. A final decision, generally, is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). "As a general rule, a partial summary judgment order is considered 'interlocutory' and non-appealable unless there is a specific statutory provision providing for appeal. However, in order to assess finality the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretional' language therein. The basic thrust of the finality requirement is that the judgment must be one that disposes of the entire case ... one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Williams v. City of Valdez*, 603 P.2d 483, 487 (Alaska 1979).

The High Court's May 11, 2018, PSJ Order is interlocutory because, although it determines liability, the entire case is not disposed of. The issue of damages still needs to be determined as to the multiple cargo claimants. There is not a judgment leaving nothing for the High Court to do but execute the judgment.

While defendants point out that delaying an appeal on the liability issue may result in wasted resources if a trial proceeds as to damages, the same might be said of every civil action where a motion for summary judgment as to liability is issued prior to determination of damages. The undersigned sees no reason to depart from past Supreme Court practice in not entertaining interlocutory appeals absent certification by the High Court as per MIRCP 54(b).

2. The High Court's PSJ Order does not effectively put the Eleni Defendants "out of court."

Defendants, relying on *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp*, 460 U.S. 1 (1983) and *Bagdasarian Prods. LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267 (9th Cir. 2012) argue the High Court PSJ Order is final for purposes of appeal because that order places defendant "effectively out of court." Both cases are distinguishable from the situation presented by the instant case.

In *Moses Cone, supra,* the District Court had issued a stay of federal proceedings pending resolution of a state action involving the identical issue of arbitrability. The concern was that the federal (stay) order would be entirely unreviewable if not appealed immediately because once the state court decided the issue of arbitrability the federal court would be bound to honor that determination as *res judicata.* The United States Supreme Court found the stay order amounted to a dismissal of the suit. *Id., at* 10. Because defendant had been effectively put out of court with no opportunity for review of the stay order, appeal was permitted.

In *Bagdasarian, supra,* the district court issued a stay order pending submission of the parties' dispute to a referee as per the parties' written agreement. The plaintiffs sought an interlocutory appeal arguing the referral put them "out of court." The Ninth Circuit found the appeal was premature because an appeal would lie upon any final judgment in the district court and, thus, the plaintiffs were not put effectively "out of court." The Ninth Circuit also discussed the "collateral order doctrine" the application of which requires that the challenged order is "effectively unreviewable on an appeal from a final judgment."

In the instant case, defendants are not "effectively out of court" because they retain the right to appeal the High Court's PSJ Order regarding liability upon entry of a final judgment.

B. Under Marshall Islands Procedural Rules "Interlocutory" Appeals Are Not Permitted Absent Certification By The Trial Court Pursuant to MIRCP 54(b).

Final judgments in admiralty cases are appealable in accordance with the rules applicable to other civil cases. The basic standard is that "[i]n order for a decree to be final, it must necessarily dispose of the entire controversy and leave nothing further for the court to do in the cause." *Anastasiadis v. S.S Little John*, 339 F.2d 538, 539 (5th Cir. 1964); *Albatross Shipping Corporation v. Stewart*, 326 F.2d 208, 210 (5th Cir. 1964). Rule 54(b) is also applicable to admiralty cases so that an order disposing of all of the claims of one party in a multiparty suit, or an order disposing of one of several claims between the same parties, is appealable upon certification of the district (trial) court. *Schoenbaum*, Admiralty and Maritime Law, 5th Ed., Sec. 14-13 Appeals, pp. 936-938 text.

The RMI Supreme Court has held that when the High Court issues an order granting partial summary judgment the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b) that the partial ruling is severable from remaining issues in the case and that there is no just reason to delay consideration of the order on appeal. *Labwidrik, et al v. Candle*, 2 MILR 1, 2 (1993).

A Rule 54(b) certification is an "essential prerequisite to an appeal" of a partial order. *See* 10 Wright, Miller & Kane, Federal Prac & Pro, Section 2660, p. 144 text; *see also, e.g., Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006); *S.E.C. v. Capital Consultants LLC*, 463 F.3d 1166 (9th Cir. 2006).

In the instant case, there is no Rule 54(b) certification and the High Court judge specifically characterized the PSJ Order as not a final, appealable judgment.

The undersigned concludes that under the Supreme Court Rules of Procedure, as interpreted by its precedent, the May 11, 2018 PSJ Order is not a final judgment and cannot be reviewed as an interlocutory order absent a Rule 54(b) certification.

C. The Maritime Nature of the Present Lawsuit Does Not Require the Supreme Court To Depart From Its Established Appeals Procedure.

1. The Provisions of 28 USC 1292(a)(3) reflect traditional admiralty practice and procedure before the courts.

28 USC 1292(a)(3) allows appeals from "interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

The purpose of this statute is to allow a party found liable in an admiralty proceeding to take an immediate appeal without submitting to a protracted trial of the damages issue. *See, Schoenbaum,* Admiralty & Maritime Law, 5th Ed., Section 1202, p. 938 text. This statute continues "the traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner." *See, Maraist, Galligan, Maraist & Sutherland,* Admiralty, 7th Ed. (Nutshell series), p. 430.

There is little, if any, doubt that the High Court's May 11, 2018, PSJ Order would be immediately appealable under 28 USC 1292(a)(3). The RMI, however, has not adopted any statute recognizing this traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial of the damage issue before a commissioner. There is no RMI Supreme Court procedural rule allowing such an appeal.

The issue (which the undersigned does not believe has been fully briefed) is whether the traditional admiralty practice of allowing an appeal of a liability determination prior to proceeding with a trial on the issue of damages has been incorporated into Marshall Islands law by virtue of 47 MIRC Sec. 113.

47 MIRC Sec. 113 provides: Insofar as it does not conflict with any other provisions of this Title or any other law of the Republic, the non-statutory general maritime law of the United States of America is hereby declared to be and is hereby adopted as the general maritime law of the Republic.

"General maritime law" is a "term of art" which denotes federal judge-made maritime law. *See, e.g., Coto v. J. Ray McDermott, S.A.*, 709 So.2d 1023, 1028 (La. 1998) *citing Schoenbaum,* Admiralty & Maritime Law, sec. 5-1 ("The General Maritime Law of the United States is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation.")

Thus, the relevant inquiry is whether the traditional admiralty practice of separate trial and appeal on the issue of liability, with subsequent trial or determination of the damage issue before a commissioner or master was part of the "general maritime law" of the United States of America and, therefore, adopted as the general maritime law of the Republic. It is here, in the opinion of the undersigned, that a distinction must be drawn between federal judge-made law that provides rules of decision in determining the substantive rights of parties in maritime disputes and procedural rules which guide the progress of cases through the courts.

2. The traditional maritime practice or procedure of allowing an appeal of a liability determination prior to trial of the damages issue is not an integral part of any substantive right of defendants recognized by the GML.

It is instructive to review those preemption cases where state procedural rules conflict with traditional admiralty practices of the federal courts. State procedure is followed so long as substantive maritime rights under the general maritime law (GML) are not altered. By analogy, RMI procedural rules in admiralty cases can be followed so long as no substantive maritime right under the GML is compromised. In the instant case no substantive maritime right of defendants is affected or altered by reserving appeal until the entry of a final judgment or certification by the High Court pursuant to Rule 54(b).

When a maritime claim is brought in state court or at law in federal court, the applicable procedure is that procedure used in processing other claims in the same courts, with one important exception: if there is an admiralty procedural rule which is an integral part of the substantive maritime right, that rule must be applied when the claim is processed in other courts. *See, e.g., Maraist, Galligan, Maraist & Sutherland,* Admiralty, 7th Ed., (Nutshell Series-West Publishing), Chpt. XIX, E, Procedure in Maritime Claims, pp. 421-22 text.

In *Lavergne v. Western Company of North America,* 371 So.2d 807 (La. 1979), the plaintiff brought a Jones Act claim against his employer, a ship-builder and their insurers in state court. Louisiana law provided for a right to jury trial whereas actions for personal injury brought under the GML do not entitle the injured plaintiff to a jury trial. The court recognized that "regardless of which court the action is brought, the federal substantive admiralty or maritime law applied if the claim is one cognizable in admiralty. (citations omitted)." The court noted that "[i]t has long been established that a state court having jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies and attach to them such incidents so long as it does not attempt to modify or displace essential features of the substantive maritime law. (citations omitted)." The court concluded that the state provision for a jury trial did not conflict with "substantive federal admiralty law" stating "affording a litigant a right to jury trial in our state courts does not, therefore, modify or displace essential features of the substantive maritime law. (citations omitted)." The court, thus, allowed trial by jury in when an in personam suit based upon the general maritime law is brought in state court even though jury trials were not allowed under the general maritime law.

Although *Lavenge, supra,* involved the "saving to suitors" clause of 28 USC 1333, the point is that the court drew a distinction between procedures for enforcing a substantive right (e.g. a jury trial) and procedures which modify or displace a substantive maritime law. In the instant case, a substantive maritime right of defendants/appellants is not being modified or displaced by following long established

RMI procedures which allow appeal only from final judgments or which allow interlocutory appeal only upon certification of the trial court. The Eleni defendants' right to appeal is preserved by existing procedural rules and defendants can appeal the PSJ upon entry of a final judgment.

III. CONCLUSION

For the reasons set forth above, the instant appeal of defendants is dismissed without prejudice to appeal upon entry of a final judgment.

Plaintiffs/Appellees request for sanctions is denied.

Dated: July 16, 2018 AST

Daniel N. Cadra, Chief Justice

ENTERED AS A SINGLE JUDGE PROCEDURAL ORDER SUBJECT TO FULL PANEL REVIEW AS PER RULE 27(c)